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IN THE

Supreme Court of the United States

October Term, 1954

No.

MASTERS, INC., *Appellant*

v.

GENERAL ELECTRIC CO., *Appellee*

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the New York Court of Appeals which affirmed a decision of the New York Supreme Court, New York County, permanently enjoining Appellant, Masters, Inc., from advertising, offering for sale, or selling appliances manufactured by Appellee at prices below the minimum retail resale prices fixed by Appellee in contracts with third-party retailers in the state of New York.

OPINION BELOW

The opinion of the New York Court of Appeals in this and companion cases is reported at 307 N.Y. 229, 120 N.E. 2d 802 (1954). The opinion of the Court of Appeals and

the findings of fact and conclusions of law by the Supreme Court, New York County, are reprinted herewith as Appendix A.

JURISDICTION

Appellee instituted this suit on November 6, 1952 in the Supreme Court of New York County, pursuant to the New York "Fair Trade" Law, General Business Law § 369-a *et seq.* (McKinney's Consol. Laws of N.Y.), to enjoin Appellant from selling appliances manufactured by Appellee at less than the stipulated minimum retail resale price. The judgment of the New York Court of Appeals was entered on June 4, 1954, and Notice of Appeal was filed with the Clerk of the Supreme Court, New York County, on August 31, 1954. The jurisdiction of this Court to review the judgment below is conferred by Title 28, United States Code, Section 1257(2). The jurisdiction of this Court is believed to be sustained by *Winters* v. *New York*, 333 U.S. 507; see *Charleston Federal Savings & Loan Ass'n.* v. *Alderson*, 324 U. S. 182, 185.

STATUTES INVOLVED

This appeal involves the constitutionality of Section 369-b of the New York General Business Law (McKinney's Consol. Laws of N.Y.), L. 1935, ch. 976, reenacted L. 1940, ch. 195, commonly known as the Feld-Crawford Act, and Section 5 of the Federal Trade Commission Act as amended, 15 U.S.C. § 45, Act of July 14, 1952, C. 745, 66 Stat. 632, colloquially known as the McGuire Act. The text of both laws is set out in Appendix B hereto.

QUESTIONS PRESENTED

1. Does the New York "Fair Trade" Law, specifically Section 369-b thereof, as applied to persons who are not parties to fair trade contracts (commonly referred to as "non-signers"), violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

2. To the extent that its validity depends upon the Act of Congress of July 14, 1952, 66 Stat. 632, 15 U.S.C. § 45, colloquially known as the McGuire Act, is the New York "Fair Trade" Law invalid for the reason that the McGuire Act unconstitutionally delegates to the several states and to private persons the legislative power and the power to regulate commerce among the several states in violation of (a) Article 1, Section 1 vesting "All legislative Powers herein granted" in the Congress; (b) Article 1, Section 8, authorizing Congress to regulate commerce among the several states; and (c) the due process clause of the Fifth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

1) The essential facts were stipulated and are not in dispute. Appellant, a New York corporation, has for many years owned and operated a retail store in New York City at which it sells thousands of items of merchandise, including appliances manufactured by Appellee, to customers in New York and by mail to persons throughout the United States. By reducing overhead costs and by eliminating costly services which countless customers are willing to forego, Appellant has been able profitably to offer merchandise at prices lower than those specified in fair trade agreements entered into by Appellee with other retailers. Appellant's policy has led to steadily increasing patronage; its annual sales at the time of suit exceeded $8,000,000.

Appellee, a New York corporation, manufactures household appliances bearing the trade mark "General (GE) Electric", which it distributes in interstate commerce. It has entered into agreements with various retail dealers in the State of New York establishing minimum retail resale prices for General Electric appliances. Under such contracts, Appellee reserves the right "in its absolute discretion" to alter the stipulated prices and to add or withdraw products subject to the agreement. Appellant

has never executed such an agreement with Appellee and, in conformity with its established practices, Appellant advertised and sold General Electric appliances at prices below those fixed by Appellee in its resale price maintenance contracts.

Appellee thereupon instituted this suit in the New York Supreme Court, New York County, for damages and for an injunction restraining Appellant from selling Appellee's appliances below the "fair trade" prices. Appellee relied upon the "non-signer" clause of the New York "Fair Trade" Act, N.Y. Gen. Bus. Law § 369-b, which provides in substance that knowingly advertising, offering for sale, or selling a commodity for less than the price fixed in a fair trade contract constitutes unfair competition, even though the party so advertising or selling is not a signatory to such an agreement. No claim was advanced that the challenged sales were made by Appellant at a loss or below cost, or that Appellant did not realize a reasonable profit from the sales of General Electric appliances, or that Appellant committed any fraud or deception in the sale of Appellee's appliances. At the time of sale Appellant had absolute title to such appliances, and no claim is here made that Appellant did not lawfully acquire such goods.

On May 8, 1953, the New York Supreme Court granted the permanent injunction as sought by Appellee (App. 30). On appeal, the judgment was affirmed *per curiam* by the Appellate Division of the New York Supreme Court on January 5, 1954 (App. 15). Its judgment was subsequently upheld by the New York Court of Appeals, 307 N.Y., 229, 120 N.E. 2d 802 (1954). (Appendix A.) The Court of Appeals rejected contentions that the New York Fair Trade Act violated the state and federal constitutions. It ruled first that the New York statute did not constitute an unlawful delegation of legislative power to private persons or a deprivation of due process under either the federal or state constitutions. These issues, said the Court, were decided adversely to Appellant in *Bourjois Sales Corp.* v.

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Dorfman, 273 N.Y. 167, 7 N.E. 2d 30 (1937), which was based upon this Court's decision in *Old Dearborn Distributing Co.* v. *Seagram's-Distillers Corp.*, 299 U.S. 183.[1] The Court also concluded, on the basis of the *Old Dearborn* decision, that the New York act did not deprive Appellant of equal protection. It said that the statute does not create an "unreasonable or arbitrary discrimination against low cost, minimum service retailers" (App. 18). The Court further denied contentions that the McGuire Act vests the states with power over interstate commerce in violation of the federal constitution. The Court said that enforcement of fair trade contracts against nonsigners constitutes "compulsion * * * expressly authorized by Congress" through the McGuire Act and does not "transgress any constitutional prohibition" (App. 20).

2) The Federal questions sought to be reviewed were raised by Appellant in the trial court in the Answer. The questions were preserved at each stage of the litigation and were passed upon by the Court of Appeals. The following excerpts from the record are here set out in compliance with Revised Rule 15(d):

(a) Constitutionality of State Statute

As a "Fourth Separate and Complete Defense to the Complaint", Appellant alleged as follows:

"26. The New York Fair Trade Law upon which plaintiff's alleged cause of action, as set forth in the complaint

[1] Shortly after its enactment, the New York "Fair Trade" Act here challenged was ruled unconstitutional by the New York Court of Appeals. *Doubleday, Doran & Co. Inc.* v. *R. H. Macy & Co.*, 269 N.Y. 272, 199 N.E. 409 (1936). The Court concluded that under decisions of this Court the statute set prices arbitrarily and invalidly delegated price fixing authority to private persons. The *Old Dearborn* opinion was rendered shortly thereafter by this Court. The Court of Appeals thereupon overruled the *Doubleday, Doran* decision and held the New York act valid. *Bourjois Sales Corp.* v. *Dorfman, supra.*

herein, is solely based, is unconstitutional and void in that it:

(a) Deprives defendant of liberty and property without due process of law in violation of Section 6 of Article I of the Constitution of the State of New York and of the Fourteenth Amendment of the Constitution of the United States."

With reference to the foregoing, the Court of Appeals stated:

"Defendants' principal attack is directed toward the constitutionality of the Feld-Crawford Act. They argue that the statute constitutes an unlawful delegation of legislative powers to private persons in violation of Section I of Article III of the New York State Constitution, a deprivation of property without due process of law and a denial of equal protection of the laws in violation of both the New York State and Federal Constitutions, particularly the former" (App. 17-18).

(b) Constitutionality of Federal Statute

As a "Sixth Separate and Complete Defense to the Complaint", Appellant alleged as follows:

"42. To the extent that the Act of Congress of August 7, 1937 (Chapter 690, Title 8), or the Act of Congress of July 14, 1952 (Chapter 745) purports to sanction the GE resale price maintenance system and the "Fair Trade Agreements" entered into thereunder and to adopt for interstate commerce the provisions of the New York Fair Trade Law, upon which this action is predicated, such laws are unconstitutional and void in that they:

(a) Deprive defendant of liberty and property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

* * *

(c) Are an unconstitutional delegation of legislative power to various states of the United States in violation of Sections 1 and 8 of Article I of the Constitution of the United States, and of Article VI of the Constitution of the United States.

(d) Are an unconstitutional delegation of legislative power to private persons in violation of Section 8 of Article I of the Constitution of the United States."

THE FEDERAL QUESTIONS PRESENTED BY THIS APPEAL ARE SUBSTANTIAL

I

The question presented by this appeal is whether the oft-challenged doctrines of *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U.S. 183, shall be permitted to stand. The "non-signer" provision of the New York resale price maintenance statute here challenged is precisely the same as the Illinois act upheld in *Old Dearborn*.[2] Knowingly advertising, offering for sale, or selling a commodity covered by a resale price maintenance contract at less than the fair trade price is made actionable, even though the defendant-seller is not a party to any such agreement.

The central thesis of this appeal is that the New York "Fair Trade" law, and the McGuire Act, 15 U.S.C. § 45, from which the state law derives ostensible validity, unlawfully delegate to private persons the power to fix prices.[3] In *Old Dearborn*, this Court concluded that such

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[2] The identical California "non-signer" statute was simultaneously sustained by the Court in a companion case, *The Pep Boys, Manny, Moe & Jack* v. *Pyroil Sales Co.*, 299 U. S. 198.

[3] The *Old Dearborn* ruling was confined to intra-state commerce; resale price maintenance in interstate commerce had been declared invalid under the Sherman Act in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373. Appellant submits (1) that the New York "Fair Trade" Act is invalid as applied both to intra-state and interstate commerce, for the reason that it delegates legis-

a provision did not constitute an "unlawful delegation of power to private persons to control the disposition of the property of others" in derogation of the due process clause of the Fourteenth Amendment (299 U.S. at 194). The Court proceeded from the premise that the non-signing seller

> "acquired the commodity in question with full knowledge of the then existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principl of fair dealing, assent to the protective restriction, with consequent liability under section 2 of the law [the 'non-signer' provision] by which such acquisition was conditioned" (299 U.S. at 193-194).

The question-begging character of this doctrine of implied "assent" was perceived by this Court in 1951 in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384. A Louisiana "non-signer" provision, identical in terms with the Illinois act in *Old Dearborn* and the New York statute here, was condemned by the Court as "coercive" and as a statutory "club" which "forced" recalcitrant retailers "to submit to price fixing".[4] The

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lative power to private persons in violation of the due process clause of the Fourteenth Amendment and (2) that the McGuire Act, 15 U.S.C. § 45, delegates power to private persons over interstate commerce in violation of Article I, Section 1, vesting all legislative power in Congress, the commerce clause, and the due process clause of the Fifth Amendment. The Court below found that "All of the transactions in issue involve interstate commerce either directly or indirectly" (App. 17).

[4] This straightforward characterization of fair trade agreements as "price fixing" is in marked contrast with *Old Dearborn* where the Court rejected the contention that private agreements pursuant to fair trade laws constituted price fixing within the meaning of decisions construing the Fourteenth Amendment (299 U. S. at 192).

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Court concluded that the Miller-Tydings Act, 15 U.S.C. § 1, did not authorize the states to "impose price fixing on persons who have not contracted or agreed to the scheme", and it characterized such legislation as "price fixing by compulsion" and a "resort to coercion" (341 U. S. at 388).[5] The *Schwegmann Bros.* decision accordingly did not require resolution of any constitutional question respecting the power of Congress to authorize the states to permit enforcement of fair trade agreements against non-signers, though it has precipitated confusion and cast doubt on the continued vitality of the *Old Dearborn* ruling. The constitutional issue is squarely raised in this case as a result of the McGuire Act, 15 U.S.C. § 45, which Congress adopted in 1952 after this Court's decision in *Schwegmann Bros.* v. *Calvert Distillers Corp.* See H. R. No. 1437, 82nd Cong., 2nd Sess., pp. 1-2 (1952).

II

Appellant submits that the "non-signer" provision of the New York "Fair Trade" Act delegates to private persons the power to fix prices in violation of the due process clause of the Fourteenth Amendment. The authority of state governments to fix prices has been upheld by this Court, but only when undertaken for a public purpose and by reasonable methods. *Olsen* v. *Nebraska*, 313 U. S. 236; *Nebbia* v. *New York*, 291 U. S. 502. Congressional power to fix prices in time of emergency was sustained where "[t]he boundaries of the field of the Administrator's permissible action [were] marked by the statute." *Yakus* v. *United States*, 321 U. S. 414, 423. Even if it be assumed that the state government may fix the retail resale price of branded merchandise, it does not follow that such power may be entrusted to private persons for their own commer-

[5] "[I]t would be a fabrication to assume that the Schwegmanns [non-signers] have consented to the prices fixed by appellee." *Schwegmann Bros.* v. *Eli Lilly & Co.*, 205 F. 2d 788, 795 (5th Cir. 1953), cert. den. 346 U. S. 856 (Holmes, J. dissenting).

cial interests and without any procedural safeguards. The New York "Fair Trade" Act delegates the authority to fix prices to interested persons without prescribed standards[6] and without any provision for hearing or review. The General Electric resale price maintenance contracts which Appellant has been enjoined to follow provide that

> "General Electric may, from time to time, *in its absolute discretion*, withdraw any or all of said products from its list of fair trade prices, may add products thereto for which minimum retail prices are stipulated and may change or revise the minimum retail prices for the said products listed therein" (emphasis supplied).

Appellant is thus forced to price merchandise to which it has absolute title and to conduct its business subject to the "absolute discretion" of Appellee, who may compel compliance in courts of equity and by suits for money damages. Precisely this power was branded by this Court in *Schwegmann Bros.* as "coercive" and a "club", p. 9, *supra*. "The delegation of power so attempted, is repugnant to the due process clause of the Fourteenth Amendment." *State of Washington* v. *Roberge*, 278 U. S. 116, 122; *Eubank* v. *Richmond*, 226 U. S. 137.

Comparable delegation was condemned by this Court in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, as an "intolerable and unconstitutional interference with personal liberty and private property." In the words of the Court:

> "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are ad-

[6] Compare the Emergency Price Control Act which required that the prices established by the Administrator be "fair and equitable, and in fixing them the Administrator is directed to give due consideration, so far as practicable, to prevailing prices during the designated base period . . ." *Yakus* v. *United States*, 321 U. S. 414, 423; see also *State of Washington* v. *Roberge*, 278 U. S. 116.

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verse to the interests of others in the same business" (298 U. S. at 311).[7]

Indeed, the "fair trade" acts grant power in excess of the authority to establish codes of "fair competition" under the National Industrial Recovery Act, struck down by this Court in *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495. Under that Act, representatives of labor and consumers, as well as the company affected, were permitted to participate in the price fixing.

The far reaching implications to consumers of unsupervised price fixing are manifest. Price fixing in any form "is one of the most effective devices to regiment whole industries and exact a monopoly price from the public. • • • The prices charged by the regimented industry are determined not by representatives of the public, as in the case of electric, water, and gas rates, but by private parties who incline to charge all the traffic will bear." *United States* v. *Line Material Co.* 333 U. S. 287, 320 (Douglas, Black, Rutledge, Murphy, J.J., concurring.)[8]

III

If the McGuire Act is for any reason invalid, the New York "Fair Trade" statute, which is predicated upon the

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[7] In *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, this Court sustained the constitutionality of the Bituminous Coal Act of 1937, passed as a result of *Carter* v. *Carter Coal Co.* The Court emphasized that Congress had transferred price fixing power from the industry to the National Bituminous Coal Commission, a federal regulatory agency. "Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid" (310 U. S. at 339). Compare the conspicuously different legislative reaction to the *Schwegmann Bros.* decision.

[8] In *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, the Court recognized that as a result of resale price maintenance agreements "all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for usual play of competition between the dealers in the product marketed by the complainant, it is not discoverable" (220 U. S. at 400).

federal act, is also void as applied to interstate commerce. The McGuire Act, in the words of the Court below, "exempts from the Federal antitrust laws fair trade agreements made pursuant to existing or future State laws, and permits their enforcement against non-signers as well as signers who are engaged in interstate commerce" (App. 19). Congress was of course aware that the state governments had not established administrative machinery for fixing retail resale prices of trademarked goods, and that such authority was sub-delegated to private persons. The states are thus mere conduits for the transmission by Congress to private persons of the power to fix prices.

The "typical method adopted by Congress when it has lifted the ban of the Sherman Act is the scrutiny and approval of designated public representatives." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 227. Thus, rate fixing agreements by rail or water carriers are exempt from the antitrust laws only after prior approval by the Interstate Commerce Commission or the Federal Maritime Board. 49 U.S.C. § 5(b)(9); 46 U.S.C. § 814. No provision, however, is made by the McGuire Act for the prior "approval of designated public representatives". In conveying the power to obtain a statutory immunity to private persons without circumscribed standards, Congress has not only departed from established precedent, but it has raised novel and important constitutional questions respecting limitations on the delegation of legislative power under Article I, Section 1, the commerce clause, and the Fifth Amendment to the Constitution. *Carter* v. *Carter Coal Co., supra; Schechter Poultry Corp.* v. *United States, supra;* cf. *Panama Refining* v. *Ryan*, 293 U. S. 388.

IV

The decision in *Schwegmann Bros.* v. *Calvert Distillers Corp.* has opened the door to a reconsideration of the con-

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stitutionality of the "non-signer" provisions.[9] The confusion created by repudiation of the *Old Dearborn* rationale should not be perpetuated. *Stare decisis* has never been deemed dispositive by this Court in cases presenting constitutional questions. As Mr. Justice Reed stated for the Court in *Smith* v. *Allwright*, 321 U. S. 649, 655; "[W]hen convinced of former error, this Court has never felt constrained to follow precedent. . . . [T]his Court throughout its history has freely exercised the power to reexamine the basis of its constitutional decisions." The *Old Dearborn* opinion was rendered while the fair trade movement was still in its incipient stages. In 1936 only fourteen states had adopted fair trade acts[10] and the economic implications of widespread resale price maintenance were not then clear. Today, fair trade laws have been adopted in more than forty states. In 1954, the merchandise sold by anti-fair trade concerns will total nearly 5 billion dollars in value.[11] The questions presented profoundly affect virtually all of the nation's retailers and the welfare of the consuming public. They should be authoritatively settled by this Court.

Appellant respectfully submits that the federal ques-

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[9] See Comments, "Fair Trade—Does It Warrant Reexamination?", 48 Northwestern U. L. Rev. 777 (1954); "Fair Trade and Horizontal Price Fixing: Their Status Since the Second Schwegmann Case", 63 Yale L.J. 538 544 (,1954); Note, 102 U. of Pa. L. Rev. 409 (1954).

[10] Bowman, "Resale Price Maintenance—A Monopoly Problem," XXV The Journal of Business of the University of Chicago 141 (July, 1952).

[11] Bream, "Discount Houses Stir Up A $5 Billion Fuss," 37 Life Magazine 52 (Aug. 9, 1954).

tions presented by this appeal are substantial and that probable jurisdiction should be noted.

Respectfully submitted,

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